

MEMORANDUM

TO: Gary Spackman
FROM: Phil Rassier *PR*
SUBJECT: Conjunctive Management of Ground Water and Surface Water in Basin 34, Big Lost River
DATE: May 3, 2004

Per your request for a legal guidance regarding application of the Idaho Department of Water Resources (Department) rules governing the distribution of water in Water District 34, the Big Lost Basin.

QUESTIONS PRESENTED:

1. What is the relationship between the overall conjunctive management rules and the rules for administration and distribution of all the waters of the Big Lost River Basin? Are the rules totally independent of each other? If the Big Lost River rules do not describe procedures for curtailment, is the traditional function of curtailment in time of shortage not an option for administration in the Big Lost Basin, or do the more general conjunctive management rules fill gaps not discussed in the more specific Big Lost River rules?

2. Rule 50.04.c.ii. states that "water users who have requested mitigation and have water rights being called for that could be filled by augmentation described in Rule 50.04.c.i shall be provided with water by augmenting the natural flow to the extent of their water right or the amount of water described in Rule 50.04.c.i. "whichever is less." What is the meaning of the phrase "that could be filled by augmentation?" Is the reference to Rule 50.04.c.i. correct, or should the rule have referred to some other subparagraph?

3. Rule 50.04.c.ii. also states that mitigation shall be provided "with water by augmenting the natural flow to the extent of their water right or the amount of water described in Rule 50.04.c.i. whichever is less." Does this mean that only the amount of the surface water users water right need to be delivered to the stream, or is the entire 13 percent to be delivered to get the users water to him?

4. What is the meaning of Rule 50.04.c.i. when it discusses assumptions of augmented natural flow "by one-third (1/3) of the depletion during the first (1/2) of the period of time that any 1905 or earlier water right being called for can [not be] filled by the natural flow through October 15th of each year. And a subsequent statement that "natural flow will be assumed to be augmented by two-thirds (2/3) of the depletion during the second one-half (1/2) of this period each year."

RESPONSES:

1. Response to Question One. The Department's "Water Distribution Rules – Water District 34" (IDAPA 37.03.12) should be view as operating independent from the Department's more general "Rules for Conjunctive Management of Surface and Ground Water Resources" (IDAPA 37.03.11) to the extent reasonably possible.

The Water District 34 rules "govern the distribution of surface and ground water within Water District 34, the Big Lost River Basin." IDAPA 37.03.12.001. The more general Conjunctive Management Rules apply state-wide "where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights." IDAPA 37.03.11.020.01. The Water District 34 Rules provide that they "shall not be construed to limit the authority of the Director of the Idaho Department of Water Resources in exercising the duties and responsibilities of the director or the department under other provisions of Idaho law." IDAPA 37.03.12.001. It is, therefore, appropriate to view the Conjunctive Management Rules as being available to fill gaps not discussed in the more specific Water District 34 rules to the extent the result would not be inconsistent with the clear intent of the Water District 34 rules.

The Water District 34 rules, for example, provide that for purposes of conjunctive administration within Water District 34, "diversion pursuant to junior rights from one water source shall be regulated as provided by these rules to provide water to senior rights from the other water source." IDAPA 37.03.12.010.05. However, the Water District 34 rules also provide that junior ground water users may submit alternative mitigation plans to the Director for consideration pursuant to Rule 43 of the Conjunctive Management Rules. IDAPA 37.03.12.050.04.e. It is therefore reasonable to conclude that should it not be possible to mitigate for junior ground water uses under the provisions of the Water District 34 rules, it is permissible for the Director to look to other provisions of Idaho law, including the Conjunctive Management Rules, in order to administer the rights in accordance with the prior appropriation doctrine.

2. Response to Question Two. The meaning of the phrase "that could be filled by augmentation" appearing in Rule 50.04.c.ii of the Water District 34 rules means that the water right for which mitigation is sought by a senior surface water right holder must satisfy the criteria of Rule 50.04. for augmentation. Those criteria are: 1) the water right must have a 1905 or earlier priority date; 2) be diverted from the Big Lost River; 3) at a point downstream from Mackay Dam; and 4) have had an adequate water supply absent the diversion of ground water under junior water rights.

The reference to Rule 50.04.c.i. in Rule 50.04.c.ii. is correct. As your question indicates, Rule 50.04.c.ii. states that "water users who have requested mitigation and have water rights being called for that could be filled by augmentation described in Rule 50.04.c.i shall be provided with water by augmenting the natural flow to the extent of their water right or the

amount of water described in Rule 50.04.c.i. "whichever is less." The reference to Rule 50.04.c.i. is correct because that is the subsection of Rule 50.04.c. that describes the process for fully augmenting the qualified 1905 or earlier surface water rights for the depletion caused by the diversion of water under junior ground water rights.

3. Response to Question Three. The language of Rule 50.04.c.ii. stating that rights requested to be mitigated "shall be provided with water by augmenting the natural flow to the extent of their water right or the amount of water described in Rule 50.04.c.i. whichever is less" ✓ means that the mitigation requirement may be satisfied by augmenting the natural flow of the river in the amount of the water right or rights making a request for mitigation or in an amount equal to 13 percent (13%) of the average annual diversion under junior ground water diversions, whichever is less.

4. Response to Question Four. Rule 50.04.c.i. states:

Natural flow will be assumed to be augmented by one-third ($1/3$) of the depletion during the first one-half ($1/2$) of the period of time that any 1905 or earlier water right being called for can not be filled by the natural flow through October 15th of each year. Natural flow will be assumed to be augmented by two-thirds ($2/3$) of the depletion during the second one-half ($1/2$) of this period each year.

This means that junior ground water users required to mitigate for the effects of their depletions upon the natural flow in the Big Lost River, may satisfy their mitigation requirement by providing one-third ($1/3$) of the full depletion amount during the first one-half ($1/2$) of the mitigation period and supplying the remaining two-thirds ($2/3$) of the full depletion amount during the second one-half of the mitigation period ending on October 15th.

I will be pleased to further discuss any of these issues with you at your convenience.